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ALEXANDER L. STEVAS,
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No. 81-523

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CONTAINER CORPORATION OF AMERICA, APPELLANT

v.

FRANCHISE TAX BOARD, APPELLEE

ON APPEAL FROM THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOR THE FIRST APPELLATE DISTRICT

SECOND MOTION OF APPELLANT TO EXPEDITE NOTING OF PROBABLE JURISDICTION

FRANKLIN C. LATCHAM
Counsel of Record
PRENTISS WILLSON, JR.
One Market Plaza
Spear St. Tower, 34th Floor
San Francisco, CA 94105
Telephone: (415) 777-6000
Counsel for Appellant
Container Corporation
of America

Of Counsel

MORRISON & FOERSTER
One Market Plaza
Spear Street Tower
San Francisco, CA 94105
Telephone: (415) 777-6000

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On November 12, 1981, appellant filed a motion to note probable jurisdiction and to hear this case in tandem with Chicago Bridge & Iron Company v. Caterpillar Tractor Co., et al., No. 81-349; Asarco Inc. v. Idaho State Tax Commission, No. 80-2015; and F. W. Woolworth Co. v. Taxation and Revenue Department, No. 80-1745.*/ Although the Court denied our motion on November 30, 1981, and is apparently holding this case to await the disposition of Chicago Bridge & Iron Company, the colloquy between the Court and counsel in the oral argument in the Chicago Bridge & Iron Company case on April 19, 1982, compels us respectfully to renew the motion.

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*/ Appendix C of appellant's Jurisdictional Statement contains a listing of appellant's parent and non-one hundred percent owned subsidiaries.

During the oral argument, several members of the Court expressed concern with respect to the adequacy of the record in the Chicago Bridge & Iron Company case and whether the Court could, in that case, resolve the question of whether Illinois' imposition of its income tax on apportioned combined worldwide business income violates the Commerce Clause. We share those concerns as to the adequacy of the record in that case.

As the Solicitor General pointed out in his Memorandum for the United States as Amicus Curiae in the Chicago Bridge & Iron Company case (pp. 4-7), there is no doubt that there is a case or controversy in that case under Article III insofar as acceptance of Chicago Bridge & Iron Company's constitutional claim will set aside the judgment in favor of Caterpillar Tractor Company. There are, however, other jurisprudential considerations that we believe the Court should take into account in determining whether that case is the appropriate vehicle for adjudicating the important constitutional question at stake. As the amicus Financial Executives Institute points out in its brief (pp. 16-24), the Court generally declines to adjudicate issues that "come to [it] in highly abstract form. . . . [J]urisdiction . . . should be exerted only when the . . . question presented . . . tenders the underlying constitutional issues in clean-cut and concrete form . . . ." Rescue Army v. Municipal Court, 331 U.S. 549, 575-84 (1947). There is accordingly a "long-settled doctrine that this Court will not determine constitutional questions . . . in a case that does not present them with sufficient clarity to make possible the circumspect consideration they require." Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 92 (1970) (Harlan, J., concurring). This doctrine is

of particular importance in these cases which involve issues sensitive to the conduct of the Nation's foreign relations.

The use by the states (here California) of the worldwide unitary combination method raises the additional considerations addressed by the Court in Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 451 (1979) in regard to state taxation of foreign commerce, as distinguished from interstate commerce, i.e. (i) the enhanced risk of double taxation and (ii) the impairment of federal uniformity. We submit that the Court should consider these issues, as it did in Japan Line, based upon a record in which double taxation is actually demonstrated. Absent such a record the Court would have to decide these important constitutional issues in a context where the basic problem of double taxation is not established. In our view, such a course of action would be particularly inappropriate insofar as the federal policy under consideration in these cases was adopted to avoid double taxation in regard to income taxes. We therefore believe that it is important for the Court to consider the impact of state income taxation upon such policy in a case with a record in which double taxation actually exists. For these reasons, we submit that the Court should note probable jurisdiction in Container Corporation of America v. Franchise Tax Board to enable these important constitutional issues to be decided on the well-developed record in this case that was totally stipulated except for the uncontroverted testimony of one expert witness. Accord, Memorandum for the United States as Amicus Curiae, pp. 7-8, n.3, 15, 18.

In renewing our request for plenary consideration, we do so with a keen awareness of the limitations of, and heavy demands upon, the Court's docket and the need to avoid

full briefing and argument in duplicative cases. But we believe that the need to consider the important constitutional questions at stake in these cases in the context of a fully developed record far outweighs the additional burden that may ensue. Nor do we intend, by this request, to derogate the merits of Chicago Bridge & Iron Company's claim for relief. Furthermore, we do not attribute the insufficiency of the record in that case to any inaction on the part of the appellant. Under Illinois procedure, Chicago Bridge & Iron Company, as an intervenor, was barred from introducing any evidence. But, had it failed to intervene, it would have been faced with a contrary Illinois precedent on both its statutory and constitutional claims. Hence, Chicago Bridge & Iron Company took every possible action to preserve its claim for relief.

Accordingly, at this juncture, we submit that the fairest course of action to all the parties that would be consistent with the circumspect consideration that the issue in these cases deserves, and indeed requires, is for the Court to defer decision in Chicago Bridge & Iron Company and note probable jurisdiction in Container Corporation of America No. 81-523.**/

**/ We are serving copies of this motion upon Counsel for the parties in the Chicago Bridge & Iron Company case and the California Franchise Tax Board.

CONCLUSION

Probable Jurisdiction should be noted.

Respectfully submitted.

Dated: April 26, 1982

FRANKLIN C. LATCHAM
Counsel of Record

PRENTISS WILLSON, JR.
Counsel for Appellant
Container Corporation
of America

Of Counsel

MORRISON & FOERSTER

AFFIDAVIT OF SERVICE BY MAIL

District of Columbia)
Washington, D.C.) ss.

JAMES E. MERRITT, being first duly sworn, says:

That affiant is a citizen of the United States, over 18 years of age, and not a party to the within cause; that affiant's business address is 1920 N. St., N.W. Washington, D.C. 20036; that affiant served the required number of copies of the attached

SECOND MOTION OF APPELLANT TO EXPEDITE NOTING OF PROBABLE JURISDICTION

on each of the following by placing same in an envelope addressed (respectively) as follows:

Don S. Harnack (1 copy)
McDermott, Will & Emery
111 West Monroe St.
Chicago, Illinois 60603

Tyrone C. Fahner (1 copy)
Attorney General
John D. WhiteNack (1 copy)
Special Assistant Attorney General
Lloyd B. Foster (1 copy)
Litigation Counsel
State of Illinois, Dept. of Revenue
State of Illinois Bldg.
Suite 600, 160 N. LaSalle St.
Chicago, Illinois 60603

William P. Sutter (1 copy)
Hopkins & Sutter
One First National Plaza
Chicago, Illinois 60603

Neal J. Gobar (1 copy)
Deputy Attorney General
110 West "A" Street, Suite 600
San Diego, CA 92101

George Deukmejian (1 copy)
Attorney General of California
6000 State Building
San Francisco, CA 94102

that each of said envelopes was then, on April 26, 1982, sealed and deposited in the United States mail at Washington, D.C., with the postage thereon fully prepaid; and that there is delivery service by United States mail at each place so addressed, or that there is regular communication by mail between the place of mailing and each place so addressed.

Affiant certifies that all parties required to be served have been served.

James E. Merritt

Subscribed and sworn to before me this 26th day of April, 1982.

Patricia G. Wakely

NOTARY PUBLIC in and for the District of Columbia.

My Commission Expires January 1, 1985